INTERIOR BOARD OF INDIAN APPEALS

Sault Ste. Marie Tribe of Chippewa Indians v. Minneapolis Area Director,
Bureau of Indian Affairs

30 IBIA 54 (10/17/1996)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
v.
MINNEAPOLIS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-150-A Decided October 17, 1996

Appeal from a decision concerning the countersigning of commercial fishing identification cards.

Affirmed.

1. Administrative Authority: Generally--Bureau of Indian Affairs: Generally--Indians: Generally--Regulations: Interpretation--Statutory Construction: Administrative Construction

   Although the Bureau of Indian Affairs can correct a prior erroneous interpretation of a statute or regulation, a change which is arbitrary or capricious, or is legally incorrect, will not be sustained.

APPEARANCES: James M. Jannetta, Esq., Sault Ste. Marie, Michigan, for appellant; Priscilla A. Wilfahrt, Esq., Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director; Kathryn L. Tierney, Esq., Brimley, Michigan, for the Bay Mills Indian Community; and William Rastetter, Esq., Suttons Bay, Michigan, and Kathryn L. Tierney, Esq., for the Grand Traverse Band of Ottawa and Chippewa Indians.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Sault Ste. Marie Tribe of Chippewa Indians seeks review of a June 28, 1995, decision of the Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA) , concerning the countersigning of fishing identification cards (ID cards). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

In 1973, the United States filed suit against the State of Michigan on behalf of members of the Bay Mills Indian Community (Bay Mills) to protect fishing rights in the Great Lakes guaranteed by, inter alia, the Treaty with the Ottawa and Chippewa Nation of March 28, 1836, 7 Stat. 491 (treaty or 1836 treaty). When the case was filed, Bay Mills was the only recognized tribe that was a successor-in-interest to the treaty signatories. While the case was pending, appellant received Federal recognition

and intervened in the suit as a plaintiff. Further background on this judicial case is set out in the court's decision in United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979).

Bay Mills succinctly set forth the factual background of the present dispute in its Statement of Reasons on appeal to the Area Director:

> On September 5, 1979, [Bay Mills] and [appellant] entered into a Memorandum of Understanding with the Department of the Interior, by which the Tribes would promulgate joint fishing regulations, in consultation with the Department and the State of Michigan, and which thereafter would be promulgated as regulations under the authority of 25 C.F.R. Part 256 (currently codified as Part 249). * * * The regulations were published as an interim rule of the Department * * * on November 15, 1979, at 44 Fed. Reg. 65747. Cited as authority for the promulgation was the [1836 treaty] as well as 25 U.S.C. secs. 2 and 9 and 25 C.F.R. Subpart A and 25 C.F.R. Part 256. Soon thereafter, the Grand Traverse Band [of Ottawa and Chippewa Indians (Grand Traverse)] was recognized by the United States, intervened in United States v. Michigan, became a party to the Department-Tribe Memorandum of Understanding, and adopted the provisions of the Joint Code. [1/] After additional consultations, the Department promulgated amended regulations as Subpart D of 25 C.F.R. Part 256 on April 28, 1980, published at 45 Fed. Reg. 28101. * * *
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> These regulations expired by their own terms on January 1, 1981, * * * which resulted in the formation of the Chippewa-Ottawa Treaty Fishery Management Authority (COTFMA) and the promulgation of fishing regulations by this inter-tribal entity in 1982. * * *
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> In 1985, the parties in United States v. Michigan negotiated a 15-year interim agreement which was entered as an order of the court. Paragraph 27 of the document required all parties to maintain in effect all rules and regulations relating to the fishery, unless modified by the procedure established in the agreement. The current rules and regulations of the [COTFMA] were last codified in 1987 * * *.
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> In each and every compilation of treaty fishing regulations, from the first interim regulation promulgated by the Department of the Interior in November 1979, to those currently in effect, identification of treaty commercial fishermen as provided in 25 C.F.R.

1/ Appellant stated in footnote 1, page 2, of its opening brief that "[t]wo other tribes--the Little River Band of Ottawa and the Little Traverse Bay Band of Ottawa--recently received statutory recognition as tribes and presumably share the [treaty fishing] right as well."

> Part 256 and its successor, Part 249, was required. * * * The cited section incorporated by reference by each set of regulations in Part 256/249 is the identification requirement of 256.3 and 249.3.

(Statement of Reasons at 2-4).

In relevant part, 25 CFR 249.3 provides:

> (a) The Commissioner of Indian Affairs shall arrange for the issuance of an appropriate identification card to any Indian entitled thereto as prima facie evidence that the authorized holder thereof is entitled to exercise the fishing rights secured by the treaty designated thereon. The Commissioner may cause a federal card to be issued for this purpose or may authorize the issuance of cards by proper tribal authorities: Provided, That any such tribal cards shall be countersigned by an authorized officer of the [BIA] certifying that the person named on the card is a member of the tribe issuing such card and that said tribe is recognized by [BIA] as having fishing rights under the treaty specified on such card. * * *
>
> (b) No such card shall be issued to any Indian who is not on the official membership roll of the tribe which has been approved by the Secretary of the Interior. Provided , That until further notice, a temporary card may be issued to any member of a tribe not having an approved current membership roll who submits evidence of his/her entitlement thereto satisfactory to the issuing officer and, in the case of a tribally issued card, to the countersigning officer. * * *

Section 5 (A) of the 1987 COTFMA regulations requires that

> [e]ach member of a tribe 16 years of age or over, engaged in treaty fishing activity shall have in his/her possession at all times either a tribal commercial fishing card, a tribal commerical fishing helper's card issued pursuant to CFR part 249.3 or a tribal subsistence fishing card issued by the tribes.

On January 27, 1995, the Superintendent, Michigan Agency, BIA (Superintendent), wrote to the President of Bay Mills, 2/ stating:

> Enclosed are letters from the Field Solicitor's office on which we are basing our decisions.
>
> The [BIA] will countersign fishing licenses as previously requested for the three COFTMA tribes. However, our staff has

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2/ Although the Area Director states that the same letter was sent to the leaders of all three tribes, only the copy sent to Bay Mills appears in the materials before the Board.

> been instructed not to question a tribal chairman's signature on a fishing card stating that a person is a tribal member. Treaty fishing rights are a right of a tribe which must decide who can participate in these rights.

Bay Mills appealed this decision to the Area Director, who, on June 28, 1995, reversed the Superintendent and issued the decision under appeal. The Area Director's decision states that (1) because the off-reservation treaty fishing regulations were promulgated in furtherance of BIA's trust responsibility, BIA has an independent responsibility to verify tribal membership for federal purposes; (2) 25 CFR 249.3 requires the Superintendent to conductan independent verification of tribal membership; and (3) 25 CFR 249.3 requires persons issued temporary cards to submit proof of entitlement to the countersigning officer.

Appellant appealed to the Board and filed an opening brief. The Area Director filed an answer brief. Bay Mills and Grand Traverse filed a joint brief in support of the Area Director's decision. Although informed of its right to do so, appellant did not file a reply brief.

Discussion and Conclusions

Appellant first argues that Bay Mills is not an interested party and lacked standing to appeal from the Superintendent's decision because the decision did not affect the issuance of ID cards to members of Bay Mills, which has an approved current membership roll.

The Board rejects this argument. The Superintendent's decision affected the joint COTFMA regulations by stating how BIA would carry out responsibilities placed on it by Section 5(A) of those regulations. Bay Mills, as a party to the COTFMA regulations, has an interest in how BIA carries out its responsibilities under those regulations. Also, the treaty fishery has been adjudicated to be held in common by the successor tribes. United States v. Michigan, 471 F. Supp. at 280. Bay Mills, as one of those successor tribes, has an interest in the entire fishery, including ensuring the proper allocation of this limited resource. Bay Mills had standing to appeal from the Superintendent's decision.

Appellant next argues that the Superintendent, as the countersigning official, is vested with discretion in determining what evidence to accept as proof of tribal membership. It argues at pages 7-8 of its opening brief:

> It is important to grasp the procedural posture of this appeal. We are not dealing with an Area Director's discretionary act, or the setting of policy consistent with some statute or regulation. We are, instead, reviewing an Area Director's reversal on appeal of a Superintendent's decision which was committed to the Superintendent's discretion by law. The Area Director completely ignored this fact, and in so doing failed to apply the proper standard of review and arrived at a clearly erroneous decision. [Emphasis in original.]

Citing Board cases holding that the Department is bound by its own regulations, appellant essentially argues that 25 CFR 249.3 vests the Superintendent with discretion that can be reviewed only for abuse. Thus appellant contends that the Area Director erred by reviewing the Superintendent's decision de novo.

Accepting for this part of the discussion appellant's characterization of 25 CFR 249.3 as granting the Superintendent at least some degree of discretion in determining what is acceptable proof of enrollment in specific cases, the short answer to appellant's contention is that nothing in 25 CFR Part 2 or Part 249 limits an Area Director's authority to review decisions reached by Superintendents, even if those decisions are based on an exercise of discretion. However, as discussed further infra, the Board concludes that the Superintendent's January 27, 1995, decision was based on an interpretation of law--i.e., an interpretation of 25 CFR 249.3 and the COTFMA regulations. There is no doubt that a BIA Area Director has authority to review a legal conclusion reached in a decision rendered by a Superintendent under that Area Director's authority. Even the Board, which has limited authority to review discretionary BIA decisions, may review legal conclusions reached in otherwise discretionary decisions. See, e.g., Baker v. Muskogee Area Director, 19 IBIA 164, 169, 98 I.D. 5, 7 (1991).

The Board concludes that there is no support for appellant's contention that the Area Director could review a decision under 25 CFR 249.3 only for abuse of discretion.

Finally, appellant argues that this appeal concerns a tribe's rights to determine its own membership and to determine who may exercise tribal treaty fishing rights. Appellant contends that these are solely internal tribal matters, and that the Area Director should have reviewed the Superintendent's decision in such a way as to avoid interfering in tribal self-government.

This argument overlooks the facts that the treaty rights being asserted were granted under a Federal treaty and were secured against state encroachment through Federal court litigation undertaken by the United States in its role as trustee for the tribes. There is clearly a Federal interest in ensuring the proper utilization of the treaty rights. It is well established that the Department may inquire into tribal membership matters for Federal purposes. Sac and Fox Tribe of Indians of Oklahoma v. Andrus, 645 F.2d 858 (10th Cir. 1981); Martinez v. Southern Ute Tribe of the Southern Ute Reservation, 249 F.2d 915 (10th Cir. 1957), cert. denied, 356 U.S. 960, rehearing denied, 357 U.S. 924 (1958); Masayesva v. Zah, 792 F. Supp. 1178 (D. Ariz. 1992); Administrative Appeal of Jennifer Rae McQueen, 4 IBIA 65, 82 I.D. 261 (1975). Furthermore, the determination as to eligibility for an ID card does not affect the individual's membership status for tribal purposes. The Board concludes that an independent BIA examination undertaken pursuant to 25 CFR 249.3 and the COTFMA regulations does not violate tribal sovereignty.

It is arguable that, having rejected appellant's arguments, the Board need not look any further into this matter. However, the Board believes

it is important to dispose of this case on the merits rather than merely on procedural grounds. Therefore, it reviews the merits under 43 CFR 4.318, which provides that "the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary of the Interior to correct a manifest injustice or error where appropriate."

The basic question in this appeal is whether the Superintendent acted appropriately in issuing her January 27, 1995, decision. Initially, it is unclear why the Superintendent issued her decision. There is no evidence in the administrative record that there was a dispute before her which the decision resolved, or even that there was a request for clarification of BIA's interpretation of 25 CFR 249.3 and the COTFMA regulations. Indeed, the Area Director professes ignorance as to why the Superintendent issued the decision. From the record, it appears that the Superintendent simply announced the way in which she intended to implement these regulations in the future.

In its opening brief, appellant contends that "Bay Mills initiated the current controversy by complaining about the procedure for issuance of ID cards by" appellant and Grand Traverse, and that Bay Mills "wanted [BIA] to independently verify membership entitlement for each ID card applicant for [appellant] and Grand Traverse before the card was countersigned" (Opening Brief at 3). Appellant asserts that the Superintendent issued her decision in response to this request, and provides a copy of the decision addressed to Bay Mills. 3/

Bay Mills and Grand Traverse paint a different background, disputing appellant's contention that the decision resulted from actions by Bay Mills. Instead they assert that, in 1994 and early 1995, appellant sought to amend the COTFMA regulations by deleting the requirement that ID cards be issued under 25 CFR Part 249, and that appellant indicated it wanted to make this change because BIA did not accept the proof of entitlement presented by one applicant and therefore refused to countersign a card appellant had issued. Bay Mills and Grand Traverse support these allegations with copies of the minutes of COTFMA meetings held on October 6, 1994; November 9, 1994; and January 25, 1995. These copies are incomplete and unsigned. 4/

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3/ No copy of any "complaint" by Day Mills appears in the administrative record. As noted in footnote 2, supra, the Area Director states that the same letter was sent to the Chairmen of all three tribes.

4/ Counsel for Bay Mills is represented at page 3 of the Nov. 9, 1994, minutes as indicating "that not only does it [the proposed amendment to the COTFMA regulations] need [COTFMA] approval, but also the Executive Council and the Federal Court. The regulations are required by the 1985 Order of the Court and therefore will need the Court's approval to modify."

These same minutes state at page 4 that Vic Matson, a representative of appellant, indicated that "BIA would like to get out of countersigning and they were the ones that suggested the odification to the regulations." The minutes continue: "Joseph Raphael [tribal affiliation not shown] asked

The Superintendent's decision was issued on January 27, 1995, two days after the last meeting at which Bay Mills and Grand Traverse allege that appellant attempted to convince them to amend the COTFMA regulations.

Appellant's filings suggest that an independent examination of eligibility constituted a change from the prior BIA practice. However, the Area Director contends that, prior to the Superintendent's decision, BIA had consistently interpreted 25 CFR 249.3 and the COTFMA regulations as requiring an independent examination of eligibility by the countersigning BIA official. The Area Director first cites testimony given at a January 13, 1978, hearing before a subcommittee of the House Committee on Merchant Marine and Fisheries. Daniel Green, who was then appellant's tribal attorney, assured Representative Phillip E. Ruppe that the tribes were not licensing anyone not entitled to exercise treaty fishing rights. Green stated: "The only people who are licensed to fish are Indians, are tribal members who not only the tribe certifies as a member but whom the BIA conducts an independent investigation which satisfied their officer that he is entitled to membership." Indian Fishing Rights: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 95th Cong., 2d Sess. 82 (1978). Green noted that BIA

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fn. 4 (continued)
that if [BIA] requested the countersigning resolution [proposing the amendment], that he see it in writing. Vic Matson reported that [BIA] did not request it, but that Marianna Shulstad [then the Department's Field Solicitor in Twin Cities, Minnesota] told [appellant] what they could do to get away from [BIA] signing the cards."

At page 3 of the Jan. 25, 1995, minutes, the following is reported:

"Vic Matson asked [BIA Superintendent] Anne Bolton how the BIA felt about countersigning. Anne Bolton stated that she would like the BIA not to countersign the fishing cards. She added that the BIA signs the cards now because it is in the consent decree. In order to change it, all three tribes would need to agree that the BIA need not sign the cards and modify the decree. Ms. Bolton added that they do not countersign for [certain other tribes].

* * *

"Mr. Matson also mentioned that the reason [appellant] is pushing for the BIA not to countersign, is because they had an incident where [appellant] approved a fisherman to get his card, but the BIA would not sign off. Anne Bolton responded that she has informed her staff, that if [the three chairmen] sign their fishermen's cards, the BIA is to sign off without question. According to the Field Solicitor's office, the treaty rights go to the tribes and the tribes can decide which people they want to exercise that right.

"Joseph Raphael and Jeff Parker [tribal affiliation not shown] asked Ms. Bolton if she had that statement in writing. She responded that she had copies and that she would send each of the three tribes a copy."

declined to approve 3 of 79 applications for ID cards submitted by appellant in 1976 "because on the basis of the information which was presented to [BIA], [BIA] did not believe that those people were entitled to be tribal members" (Id.).

The Department's then Field Solicitor also testified at the hearing, stating at page 196 that

> [i]n exercising the treaty rights, they, in these cases, must be members, must be able to prove membership where I.D. cards are issued by [BIA]. Their name either has to appear on the approved roll, and by "approved" I mean approved by the Department of the Interior, or, if there is not any official approved roll, then [BIA] must personally check the background information to make sure that the person being recommended for identification meets the membership criteria.
>
> The Bay Mills Community has an approved roll. [Appellant] does not. So, in certifying I. D.'s, [BIA] checks to see whether or not the name of the person being--seeking I.D. is on the Bay Mills roll. As to [appellant] they actually go through a process of checking the membership materials that are submitted by the individuals to satisfy themselves that they are eligible for enrollment and therefore eligible for I.D. cards.

The Field Solicitor further commented that "the tribes requested the Secretary of the Interior to issue I.D. cards for those persons who could qualify as members with the hope that once these I.D. cards were issued, that the [Michigan] department of natural resources would be more readily able to identify bona fide fishermen" (Id. at 197).

In further support of her contention concerning BIA's past interpretation of 25 CFR 249.3 and the COTFMA regulations, the Area Director submits copies of some twenty letters issued between 1978 and 1993 as proof that BIA has previously conducted such an independent examination and has declined to countersign ID cards when that examination has not shown that the individual was eligible for tribal membership. Several of these letters were signed by the same superintendent who issued the January 27, 1995, decision now under review.

As previously mentioned, Bay Mills and Grand Traverse contend that appellant sought to amend the COTFMA regulations to remove the requirement for a BIA countersignature when BIA refused to countersign a card submitted to it.

These statements all indicate that BIA had previously interpreted section 249.3 and the COTFMA regulations as requiring it to conduct an independent examination of eligibility. Appellant could have disputed any or all of these statements in a reply brief. It failed to do so.

The Board finds that BIA has previously interpreted 25 CFR 249.3 and the COTFMA regulations as requiring it to conduct an independent examination of the enrollment status of those individuals claiming entitlement to exercise treaty fishing rights as members of appellant before countersigning ID cards. It further finds that the Superintendent's decision to accept the signature of the tribal chairman as conclusive proof of eligibility is a change from the Department's prior interpretation of the regulations.

[1] The Board has held that the Department is not bound by a prior erroneous interpretation of law or regulation, but can correct that interpretation as long as the reason for the change is clearly set forth to show that the change is not arbitrary or capricious. See, e.g., Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, 24 IBIA 169 (1993); Hopi Indian Tribe v. Director, Office of Trust and Economic Development, 22 IBIA 10 (1992). The Superintendent's decision changed the prior interpretation of 25 CFR 249.3. The question then is whether the Department's prior interpretation was erroneous.

The Superintendent stated that her decision was based on three letters from the Field Solicitor to the Area Director. For purposes of this discussion, the Board assumes that each of these three letters is factually and legally correct.

The first letter was written on June 29, 1993, and concerns the countersigning of comrercial fishing permits issued for members of the Keweenaw Bay Indian Communiity. Although the letter references the position taken by the United States in a preliminary matter raised in United States v. Michigan, it clearly states that BIA does not normally become involved in countersigning off-reservation fishing permits, unless requested to do so by the tribe involved. BIA has been requested to countersign ID cards here through section 5 (A) of the COTFMA regulations. The Board finds that this letter does not support the Superintendent's change in the interpretation of section 249.3.

The second letter, dated February 1, 1990, concerns the improper issuance of a helper's ID card to an individual who was Indian, but not a member of any of the three tribes. The letter states at page 2: "Members of bands other than Bay Mills, [appellant] and Grand Traverse should not be issued commercial fishing licenses in order to fish within the area managed and regulated by the COFTMA. [ID] cards for such individuals should not be countersigned by [BIA]." This letter is not relevant to the countersigning of ID cards for persons claiming to be members of the three tribes.

The third letter was written on June 21, 1982, and discusses whether ineligible individuals might have been issued subsistence fishing permits by appellant. The letter states that "the right to fish is a right of the tribe exercised by persons licensed and regulated by the tribe," and that appellant's tribal attorney had stated that the tribe intended to withdraw permits that might have been issued improperly. Section 5(A) of the COFTMA regulations does not require BIA countersignature of subsistence fishing

cards issued by the tribes. Therefore, this letter is also not relevant to the issues raised here.

The Board concludes that the letters cited by the Superintendent do not show that the Department's consistent prior interpretation of 25 CFR 249.3 and the COTFMA regulations was legally incorrect or otherwise erroneous. Without support for a conclusion that the prior interpretation of the regulation was erroneous, it was error for the Superintendent to change that interpretation. The Board affirms the Area Director's reversal of the Superintendent's decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 28, 1995, decision of the Minneapolis Area Director is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge